No. 21706

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

v.

ARDELL LEE, ET AL.,

Appellees.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

REPLY BRIEF FOR THE APPELLANT

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1. A substantial portion of appellees' brief (pp. 6, et eq.) is devoted to arguments derived from the legislative istory of the Federal Tort Claims Act and language in Brooks v. nited States, 337 U.S. 49. However, similar arguments were made o, and rejected by, the Supreme Court in Feres v. United States, 40 U.S. 135. The Supreme Court in Feres took into account the considerations persuasive of liability" which appellees urge

here (340 U.S. at 138-139), but concluded:

> that the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service (340 U.S. at 146). 1/

Moreover, as stated in our main brief (pp. 12-13), Congress has acquiesced in the holding of Feres, permitting the decision to stand undisturbed for more than 17 years.

2. Although appellees correctly note that the Government's brief in Feres referred, in part, to considerations of military discipline (Appellees' Brief, pp. 9-10), the considerations underlying the Feres rule were stated at length in the Court's opinion. As stated in our main brief (pp. 7-8), the Court in Feres emphasized, inter alia, that the relationship existing between the United States and its military personnel is one "distinctively federal in character," and that the application of local law to that relationship, by virtue of the Tort Claims Act, would be completely inappropriate. 340 U.S. at 143-144. The Court also stressed that the Act "should be construed to fit, so far as will comport with its words, into the entire statutory system of remedies against the Government to make a workable,

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1/ Since appellees' complaint specifically alleged that the deaths involved here occurred while the decedents were "on active duty" in the United States Marine Corps (R. 2, 4), the district court correctly recognized that "the deaths of the two servicemen clearly were in the course of activity incident to their service with the Marine Corps" (R. 43). There is no basis in fact or law for appellees' contention (Appellees' Brief, pp. 2-3) that the deaths were not incurred "incident to service."

consistent and equitable whole" (340 U.S. at 139), and that it was thus highly relevant that Congress had already provided "system of simple, certain, and uniform compensation for injuries or death of those in armed services." 340 U.S. at 144.

Moreover, as noted in our main brief (p. 10, fn. 3), in Feres, itself, the threat to military discipline was far less direct than it is here. The three cases decided in Feres involved a sleeping soldier (Feres) who died due to alleged negligence in maintaining a defective heating plant and failing to maintain an adequate fire watch, and two other soldiers (Jefferson and Griggs) who were injured by alleged medical malpractice occurring while they were relieved from military assignments and duties and on sick or hospital leave from those duties. The necessity of maintaining discipline while soldiers are sleeping, or on operating tables, is far less clear than the necessity of maintaining discipline among soldiers being shipped to Viet Nam in military aircraft under the control of military authorities.

3. Contrary to appellees' contentions (Appellees' Brief, pp 10-13), it is clear, as stated in our main brief (pp. 8-12), that the Supreme Court never has deviated from the rule of Feres: that the right to maintain a Tort Claims Act suit based on injuries incurred by a serviceman depends upon whether the injuries were incurred "incident to service." Thus, in United

States v. Brown, 348 U.S. 110, 113, the Supreme Court expressly said:

> We adhere * * * to the line drawn in the Feres case between injuries that did and injuries that did not arise out of or in the course of military duty.

And in United States v. Muniz, 374 U.S. 150, 159, the Supreme Court reiterated that it found "no occasion to question" the holding in Feres. See, also, Indian Towing Co. v. United States, 350 U.S. 61, 69.

Moreover, as stated in our main brief (p. 11), the Supreme Court has confirmed the viability of Feres by its consistent application of its rationale in workmen's compensation statutes: "practically always thought of as substitutes for, not supplements to, common-law tort actions." United States v. Demko, 385 U.S. 149, 151.

4. Notwithstanding appellees' contentions (Appellees' Brief, pp. 14-19), as stated in our main brief (pp. 13-17), the courts of appeals have consistently applied the Feres rule in all cases involving injuries "incident to service," regardless of the lack of an "official military relationship" between the claimant and the alleged tortfeasor, or of an immediate threat to military discipline.

a. As our main brief demonstrates (pp. 13-14), this Court's decision in Callaway v. Garber, 289 F. 2d 171, certiorari denied, 368 U.S. 874, is completely controlling here. Although the appellees assert that the explanation of Feres offered in

Brown does apply to the facts of Callaway (Appellees' Brief, pp. 14-15), this Court in Callaway expressed a contrary view, stating that "[t]he instant case can find no shelter within those reasons * * *." 289 F. 2d at 173-174.[2/] The reason why this Court in Callaway held that the Tort Claims Act suit could not be maintained was that "the instant case does fall within the rule of the Feres case as promulgated, and we must adhere to said rule since it was in no way negated or modified by the later Brown case." Id., at 174.

Appellees also contend (Appellees' Brief, p. 15) that Callaway should be "examined further" in the light of United States v. Muniz, 374 U.S. 150. However, as noted in our main brief (pp. 11, 14), the Supreme Court in United States v. Demko, 385 U.S. 149, 153, explained that Muniz merely held that federal prisoners could sue the Government in tort since "neither of the two prisoners * * * was covered by the prison compensation law." And, in Muniz, the Supreme Court expressly noted that it found "no occasion to question" the holding in Feres. 374 U.S. at 159.[3/]

2/ The fact that the tortfeasor in Callaway might be subject to the scrutiny of his superiors (Appellees' Brief, p. 15) is clearly unrelated to the "discipline" problem to which the Supreme Court had reference in Brown-viz., the scrutiny by a court of a superior officer's judgment at the behest of one under his command.

3/ As we pointed out in our main brief (p. 14, fn. 7), a decision of this Court rendered subsequent to Muniz is in accord with Callaway v. Garber, supra. Appellees attempt to distinguish this subsequent decision -- United Air Lines, Inc. v. Wiener, 335 F. 2d 379, 396-398, 402, 404, petition for a writ (Continued)

b. The appellees assert that "the sole question" considered in Layne v. United States, 295 F. 2d 433 (C.A. 7), certiorari denied, 368 U.S. 990, was "whether decedent was on active duty with the federal government" (Appellees' Brief, pp. 17-18). However, as our main brief states (p. 14), the plaintiff in Layne specifically contended that her suit was not barred by Feres because the alleged negligence was that of civilian control tower operators rather than of other military personnel (Brief of Plaintiff-Appellant, pp. 5, 11, 32-34, 37; Reply Brief of Plaintiff-Appellant, pp. 2-3, 6-9). The court of appeals found this and other arguments of the plaintiff to be "lacking in merit," and dismissed the suit on the ground that the death occurred "as an incident to military service" (295 F. 2d at 436).

c. Appellees state that the court in Sheppard v. United States, 369 F. 2d 272 (C.A. 3), certiorari denied, 386 U.S. 982 was not presented with the question of "the military relationship issue of a serviceman vis-a-vis a civilian or an F.A.A. employee of the Government" (Appellees' Brief, p. 17).

(Footnote 3 Continued) of certiorari dismissed, 379 U.S. 951 -- on the ground that "[n]o action was commenced against the Government by the estates of the servicemen-passengers" (Appellees' Brief, p. 18, fn. 9). However, the estates of the servicemen-passengers did sue United Air Lines, which in turn sought indemnity from the United States. Even though the Government's liability was predicated, in part, upon negligence of employees of the Civil Aeronautics Administration, the United States successfully urged, as a defense to the indemnity claim, that "the government is not liable under the Federal Tort Claim Act for injuries to servicemen where injuries arise out of or are in the course of activity incident to service." 335 F. 2d at 404.

However, as we pointed out in our main brief (p. 15), the plaintiffs in Sheppard specifically argued, not only that subsequent Supreme Court decisions had "destroyed the validity" of Feres, but that, in any event, Feres should be limited to situations that "pose a threat to military discipline." 4/ Both of these

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4/ Thus, plaintiffs in Sheppard urged:

> Assuming, for purposes of argument, that there is still some vitality in Feres, the Supreme Court has limited the rationale of that case to situations where there is a possibility of interfering with military discipline, and Feres, therefore, should be applied only in situations where a right of recovery would pose a threat to military discipline. * * *
>
> * * * * *
>
> A more workable distinction between cases where servicemen may and may not collect, which is more in conformity with the rationale of Feres and the language of the Act and which would be in terms familiar to the law of torts, is as follows: If the "peculiar and special relationship of the soldier to his superiors" is not merely a passive background or circumstance to the accident but is instead a proximate or legal cause of the accident, the serviceman may not collect under the Tort Claims Act (Brief of Appellants, pp. 21, 27).

And the Sheppard plaintiffs also urged:

> In the present case, the relationship of the decedents to the Government, insofar as is relevant to the happening of the accident, was not the "peculiar and special relationship of the soldier to his superiors," but rather the common relationship of airplane passengers to airplane operator. Their status as marines was merely a passive background or circumstance to the accident and was not the legal cause of the accident. (Continued)

contentions, which are basically identical to those accepted by the court below and urged here by the appellees, were unequivocally rejected by the Third Circuit in Sheppard, 369 F. 2d at 272. 5/

(Footnote 4 Continued)

> Although decedents were no doubt subject to military orders from the crew of the aircraft, such orders would be no different from the normal orders a commercial airline crew would give to its passengers such as "fasten seat belts" and "no smoking." And the ground crews whose negligence in maintaining the aircraft is a partial basis for the present action would have had no contact with decedents at all.
>
> It is inconceivable that knowledge by the decedents that they or their estates would have a right of action against the Government in the event of a plane crash would lead to breaches of discipline. And it is equally inconceivable that knowledge by the flight crew or ground crews that the military passengers on the plane could sue in the event that they negligently caused a crash would in any way interfere with the performance of their duties. * * * (Brief of Appellants, pp. 28-29).

5/ Appellees' discussion (Appellees' Brief, pp. 14-19) of other court of appeals cases cited in our main brief (p. 16, fn. 11) simply ignores the import of those decisions.

Appellees cite two decisions in support of their claims (Appellees' Brief, pp. 5, 13): Ingham v. United States, 373 F. 2d 227 (C.A. 2), certiorari denied, ___ U.S. _____; and United States v. Furumizo, 381 F. 2d 965 (C.A. 9). Neither of these cases involved the claims of servicemen and neither contains any reference to the Feres rule.

CONCLUSION

For the foregoing reasons, and for the reasons stated in our main brief, the district court's order should be reversed and judgment entered in favor of the appellant dismissing the complaint.

Respectfully submitted,

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DECEMBER 1967.

CERTIFICATE

I certify that, in connection with the preparation of this reply brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing reply brief for the appellant is in full compliance with those rules.

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LEONARD SCHAITMAN, being duly sworn, deposes and says:

That on December 19, 1967, he caused three copies of the foregoing Reply Brief for the Appellant to be served by air mail, postage prepaid, upon counsel for appellees:

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Subscribed and Sworn to before
me this 19th day of December, 1967.
[Seal]

Angeline Johns
NOTARY PUBLIC

My commission expires on April 14, 1972.